BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The District Court rendered a decision which is not officially reported, but appears at pages 72 to 74 of the record.

The opinion of the Circuit Court of Appeals is reported in 132 F. (2d) 715.

Statement.

The essential facts of the case are stated in the accompanying petition; and in the interests of brevity are not repeated here. Any necessary elaboration of the facts on the points involved will be made in the course of the argument which follows.

Summary of Argument.

The points of the argument follow the reasons relied upon for the allowance of the writ of certiorari.

Argument.

POINT I.

The Court of Appeals erred in holding that there was a continuing duty upon the "Edwin Duke" which prevented her from being treated as an attempting salvor and thereby avoiding the towage warranty. In any event, the question whether the rescue effort constituted an attempted salvage presented an issue for the jury.

As noted in the annexed petition, the "Duke" went to the aid of the three drifting barges primarily in order to rescue the crews on the barges (R., pp. 21, 23). In view of the dangerous weather conditions then prevailing, it is evident that the crews on the barges were in grave danger. Under the circumstances a statutory duty was imposed upon the "Duke's" master, apart from any contractual obligation owing to the tow, to render all possible assistance to the helpless men on the drifting barges (46 U. S. C. A., sec. 728).

The mentioned statute provides that:

> "The master or person in charge of a vessel shall, so far as he can do so without serious danger to his own vessel, crew, or passengers, render assistance to every person who is found at sea in danger of being lost; and if he fails to do so, he shall, upon conviction, be liable to a penalty of not exceeding $1,000 or imprisonment for a term not exceeding two years, or both."

Apart from statutory obligation, it has long been recognized that there is an imperative duty upon every mariner to go to the assistance of those upon the seas who

are in distress and in danger of losing their lives (*The Schooner Boston*, 1 Sumner 328, 355). Accordingly, it has become an accepted principle in marine law that a departure from the usual course in response to this duty will not affect the covering insurance, or release the underwriters from their liability (*The Cuzco*, 154 Fed. 177, 178 [C. C. A. 2]; *Crocker* v. *Jackson*, 6 Fed. Cas. No. 3398, p. 829; *Williams* v. *Box of Bullion*, 29 Fed. Cas. No. 17717, p. 1359; 5 Couch on Insurance, 3731; Arnould on Marine Insurance [11th ed.] 601; 3 Cooley's Briefs on Ins. [2d ed.] 2466; 38 Corp. Jur. 1089 [sec. 244]).

In the Court below petitioner sought to apply the principle enunciated by the foregoing cases to the situation at bar for the purpose of avoiding the towage warranty. It would seem from the opinion below that this principle would have been accepted and applied to the instant situation to avoid the warranty had the Court found, in the circumstances at bar, that the "Duke" actually engaged in an attempted salvage.

The Court below held, however, that the "Duke" had not engaged in an attempted salvage, reasoning that she was under a duty to make all reasonable effort to save her tow, and that such continuing duty prevented her from being treated as an attempting salvor. In reaching this result, the Court overlooked not only the statutory obligation imposed upon the "Duke's" master, but, also, the fact that if, as the Court held, and as the evidence indicated, the tug was too small and inadequate for the rescue job she tried to do, she necessarily exceeded any contractual obligation owing to her tow when she attempted to save the three barges and their crews, and, hence, actually was rendering a salvage service which was sufficient to avoid the towage warranty under the authorities hereinbefore adverted to.

Granted that the "Duke" was required to go to the

assistance of the barges, and that she could not abandon them without making all reasonable effort to save them, it does not follow, under the facts of this case, that such duty necessarily ran to the extent of requiring the "Duke" to attach a hawser on the barges and attempt to tow them away. The tug's duty, in all good reason, could not exceed her fair capacity of performance. As we will hereafter show, what the tug actually undertook to do, under the conditions then prevailing, was more than a reasonable effort, and, considering her concededly limited qualifications for the task, was outside and beyond any fair obligation that she owed her tow.

Generally, it is well established that the rendition of an extraordinary service by a towing tug, one not within the scope or contemplation of the original engagement, entitles the tower to be treated as a salvor (*The City of Portland*, 298 Fed. 27, 30 [C. C. A. 5]; *The Connemara*, 108 U. S. 352, 358, 27 L. Ed. 751; *The City of Haverhill*, 66 Fed. 159, 160; 56 Corp. Jur. 16 [sec. 15]).

In its prior decision, the *Jos. F. Clinton*, 250 Fed. 977, 979, the Court below recognized that a towage may develop into a salvage, where the service rendered by the tower is outside the contemplation of the parties.

In *The City of Portland, supra*, the Fifth Circuit, in referring to the rule prevailing in this country and in England, stated the rule, at page 30, as follows:

> "Yet here, as well as there, a towage service may be converted into a salvage."

In *The Connemara, supra*, page 358, this Court cited with approval the decision in an English case, *The Minnehaha*, 15 Moore (P. C.) 133, where it was said:

> "But if, in the discharge of this task, by sudden violence of wind or waves, or other accidents, the

> ship in tow is placed in danger, and the towing vessel incurs risks and performs duties which were not within the scope of her original engagement, she is entitled to additional remuneration for additional services if the ship be saved, and may claim as salvor, instead of being restricted to the sum stipulated to be paid for mere towage."

In the instant case the towage service clearly developed into an attempted salvage when the "Duke" placed her hawser on the first of the three barges and attempted to tow them and their crews to safety. The obligation owing by a tug to assist its tow requires only a *reasonable* effort by the former, as was stated in the *Clinton* case, *supra*. What will constitute a reasonable effort will vary in each case, and, necessarily, must depend upon the power and suitability of the towing tug to meet, and cope with, the requirements of the exigency with which she finds herself confronted.

This is particularly true where, as in the instant case, the tug is only one of three engaged in, what the Court below termed, a common venture, and where each of the tugs is of a different size and horsepower. In such circumstances the same measure of assistance cannot fairly be expected of each tug. The extent of the reasonable effort required of each tug in such a situation necessarily must vary with, and depend upon, the size and power of the respective tugs.

A small tug of limited horsepower, like the "Duke", could not fairly be subjected to the duty of towing, in a raging gale, a number of sizeable barges. Obviously, such an onerous obligation could properly be expected only of a larger tug, with more adequate motive and pulling power, such as the "Henjes". If the smaller tug, under such conditions, and in response to the statutory mandate to save life in distress, ventures alone to tow

the barges and their crews to safety, it is evident, we believe, that the operation, at that point, has been converted into a salvage service.

By refusing to adopt this view the Court below in effect, made the "Duke" an insurer of the safety of her tow. It is well settled, however, that a tug is not liable as a common carrier or as an insurer for damage to its tow, but is required to use only ordinary care and prudence (*Stevens* v. *The White City*, 285 U. S. 195, 202; *Simkins* v. *R. L. Morrison & Sons*, 107 F. [2d] 121, 122 [C. C. A. 5]). The obligation resting on the "Duke", in the circumstances at bar, did not require her to go as far as she did in her rescue effort.

In considering the extent to which the towing tug is obliged to go in order to satisfy her duty to her tow, it must be remembered that she is only bound to employ those means consistent with her safety (*The Mosher*, Fed. Cas. No. 9874; *The W. J. Keyser*, 56 Fed. 731, 734 [C. C. A. 5]), and that she is required to apply only such means as lie within her power (*The Robert L. Stevens*, Fed. Cas. No. 8). In accordance with these limitations it would be unreasonable, manifestly, to extend the tug's duty to a point beyond her capacity of performance.

In the instant case, referring to the attempted rescue, the Court below held that the "Duke" was too small for the job she tried to do. Indeed, so respondents contended in their brief below. Thus, it was said there in respect of the "Duke's" attempt to effect the rescue that it was "* * * a job for which her feeble 200 horsepower was totally inadequate". Similar admissions were made throughout respondent's brief in the Court below.

If the "Duke", so far as her normal duty was concerned, was too small for the job, and her motive power

totally inadequate for the task, it would be an anomaly to hold that her duty to her tow required her to throw a hawser on the three barges and tow them out of danger in the teeth of a furious gale. Considering the prevailing weather conditions, the size and number of the barges in distress and her own physical limitations, it is submitted that the tug's duty did not extend so far, and that when the "Duke" undertook that task she was clearly going beyond what her tow could reasonably expect of her, and that she then was, as a matter of law, rendering a salvage service.

Moreover, in this connection, it must be borne in mind that the "Duke", by statutory mandate, was obliged to attempt to rescue the crews on the barges, apart from any obligation she owed the barges themselves. This circumstance, alone, which is not mentioned in the opinion below, was sufficient, we submit, to convert the rescue attempt into a salvage service.

At the very least, upon the record, there was presented a fair question of fact for the jury whether the "Duke's" duty to her tow required her to go to the extent that she did in attempting the rescue. Surely reasonable minds could find, with justification, that, in the light of the existing conditions, her own physical limitations and the nature of the task confronting her, the "Duke's" duty to her tow required no more than that she await the arrival of the five hundred horsepower "Gerd Henjes" to undertake the job of towing the barges,* and in the interim do no more than stand by and render all assistance short of putting on a hawser and attempting to tow away the barges.

Something of this sort seems indicated by the remark in the opinion below that "the evidence is so clear that she had

* The "Henjes" had actually started to go to the assistance of the barges, but finally abandoned the attempt (R., pp. 65, 66).

done all she safely could for her tow, *and perhaps even more,* * * *". A jury might reasonably find upon all the evidence that in undertaking the difficult and hazardous task of attempting to tow the barges the "Duke" had in fact done more than her duty, and thus was rendering a salvage service.*

Whether the "Duke's" efforts reached a point where it might be claimed that her master had acted unreasonably, thereby forfeiting petitioner's right to maintain that the attempted salvage avoided the warranty, assuming any such principle possesses merit and is here applicable, also, would, at best, present an issue of fact. Reasonable minds might fairly find that the tug's activities, although exceeding her duty to her tow, had not reached an unreasonable extreme, and were necessitated by the statutory obligation to save life in distress, that being the avowed object of her efforts. Furthermore, even though the tug's master were found negligent, petitioner's right to a recovery would remain unaffected because the policy specifically insures against negligence of master and mariners.

In attempting in the circumstances at bar to save the barges and their crews the "Duke", by reason of her limited motive power, capacity and size, was rendering an extraordinary service, one plainly beyond any normal, or fair, obligation owing to her tow, and one which indisputably involved the rendition of more than a reasonable effort for the preservation of the tow, or at least so a jury might fairly find. The operation, therefore, properly constituted a salvage, and, as such, was sufficient to avoid the towage warranty and permit a recovery notwithstanding the prior breach.

In reaching a contrary conclusion the Court below has

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* It is noteworthy that the Trial Court was of the opinion that the rescue attempt constituted a salvage (R., p. 72).

attained a result inconsistent with the facts as found by it, and in conflict with the applicable decisions. The decision below creates a standard of duty which is grossly unfair to towing vessels and greatly at variance with the accepted standard heretofore applying to such vessels. There has been here prejudicial error of the most serious kind under such circumstances as should prompt this Court to exercise its discretion in granting certiorari.

POINT II.

The Court of Appeals erred in holding that there was no fair question of fact to be decided by the jury as to the actual cause of the loss. In so holding the Court improperly deprived petitioner of his right to a jury trial upon a vital and decisive issue in the case.

The Court below held that in order to be entitled to a recovery the petitioner was required to prove that the sinking, which concededly occurred after the policy reattached, was not caused by injuries the vessel received while the insurance was suspended. Upon the facts before it the Court was of the opinion, however, that the evidence conclusively established that the sinking was occasioned by injuries sustained while the insurance was suspended, viz., in the course of the attempted rescue.

In so holding the Court relied on the circumstances that during this period the vessel became involved in a severe storm, was pulled into shallow water, pounded on the bottom for some minutes, and finally cut away from her tow in the interests of her own safety. None of these circumstances, singly or in combination, compel the conclusion that they were the actual cause of the loss.

This is especially so if they be considered in conjunction with, and in the light of, the events which subsequently occurred while the tug was running light. Considering the evidence as a whole, there is room for reasonable minds to differ as to the cause of the loss, and in such circumstances the direction of a verdict was not warranted (*Sioux etc. R. R. Co.* v. *Stout*, 84 U. S. 657, 663-664; *Parsons* v. *Trowbridge*, 226 Fed. 15, 18 [C. C. A. 8]; *Delk* v. *R. R. Co.*, 220 U. S. 580, 587-588).

It would appear that the principal circumstance which influenced the Court's conclusion is the so-called pounding of the tug on the bottom, which, the opinion states, lasted for about twenty minutes. We submit that the evidence does not show conclusively that the vessel pounded on the bottom for any such length of time. The only reference to the duration of this occurrence is found in Captain Dowd's statement (Pltff.'s Exh. 5-e; R., p. 80).

There the master states that after attaching a hawser on the "Burr", one of the barges, the "Duke" immediately headed off shore, paying out the hawser for about 500 feet. She then endeavored to pull out the barges into deep water, but without avail. The statement continues that the sea was so high that on the rise and fall of each wave the "Duke" would strike bottom with considerable force. In the following paragraph, the affiant states: "This lasted for about 20 minutes and instead of making headway, we were constantly drifting with the barges onto the shore."

The word, "this", does not refer to the duration of the pounding, but rather to the length of time occupied by the entire operation, or at least so it might fairly be inferred. In this connection it is noteworthy that Dowd testified that the tug had its hawser on the barges for about twenty minutes to a half hour (R., pp. 45, 57), and that the second time the vessel touched bottom he ordered

the hawser chopped (R., p. 24). At the very least there is a fair question of fact whether it was the pounding or the entire rescue attempt that lasted twenty minutes.

If the facts be viewed in the light most favorable to petitioner, as they should be on appeal (*Lumbra* v. *United States*, 290 U. S. 551, 553; *Worthington* v. *Elmer*, 207 Fed. 306, 308 [C. C. A. 6]; *Osipoff* v. *City of New York*, 286 N. Y. 422, 425), any uncertainty or conflict in the evidence is required to be resolved in his favor. A jury, therefore, might reasonably find that the tug touched bottom only two or three times, and then for a period considerably less than twenty minutes, without sustaining any damage, especially since there is no evidence that the hull was stove in or that she was taking water from the bottom.

Apart from the pounding incident there is nothing of such a conclusive nature in the evidence as to compel the conclusion that the tug was damaged or rendered unseaworthy during the rescue attempt. Her involvement in the storm, and the drifting into shallow water, were risks which she may have successfully survived without harm, or, at least, so a jury might fairly find.

In passing, it may be noted that the so-called shallow water was about twenty to twenty-five feet deep (R., p. 45), a circumstance which tends to negative any suggestion that the contact was of a very forcible nature. Indeed, Captain Dowd denied that the tug struck bottom with much force (R., pp. 46, 52). Any contradiction between Dowd's testimony and his subsequent written statements affects merely the weight and credibility of his testimony, and does not compel acceptance of the statements as conclusive, or the direction of a verdict for respondents (*Robinson* v. *Van Hooser*, 196 Fed. 620, 626 [C. C. A. 6]).

The word, "pound" (R., p. 87) appears to have been adopted by Dowd without understanding of its significance. The statement was made by the master shortly after his harrowing experience, and, at a time when, apparently, he was not in a fit condition to draw any distinction between merely striking and pounding, as his testimony indicates (R., p. 52).

If, as petitioner maintains, a jury might reasonably find that the vessel touched bottom only momentarily, it is evident that the basis for giving a conclusive effect to this episode must fall because a jury might then fairly find further that the so-called pounding, as well as the other circumstances mentioned by the Court below, were entirely insufficient to cause the loss.

Going a step further, a jury considering the events which transpired subsequent to the rescue attempt, could reasonably find that the perils then encountered were the actual cause of the loss. In this connection the undisputed evidence was that the tug was not sinking when she cut away from the barges and that the water which was coming in over her deck was being pumped out (R., p. 58). The water previously shipped was probably held by the tug's pumps, as respondents admitted in their brief below.

After cutting away from the barges at about 8:40 P. M. (R., pp. 25, 57), the tug appears to have navigated her course without difficulty (R., pp. 53, 58-59) for about three-quarters of an hour, until about 9:30 P. M., when she sent out distress signals. During this period, it is significant, the severity of the storm intensified considerably (R., p. 57).

Evidently, it was during this period, while the "Duke" was running light, that the seas became rougher and struck the vessel with overwhelming force. The waters then came in with such rapidity and force that the tug

was unable to rid herself of them as quickly as they swept over her, with the result that she was severely battered and gradually swamped, ultimately succumbing to the fury of the elements.

A graphic picture of the conditions encountered by the "Duke" after she had cut loose from the barges, and of their effect upon her, was given by the "Duke's" master, who testified, as follows:

> "Q. Now, under what engine speed did you then proceed towards Coney Island? A. Very slow. We couldn't go fast because we would dive into the big seas.
>
> Q. Was your tug affected in any way by these seas to your knowledge? A. Yes. *The tug was being buried in these seas, and the windows were being broken in the pilot house and the seas were coming right there, knocked me down a couple of times.*
>
> Q. Were you at the wheel? A. At the wheel.
>
> Q. Was this on the way back? A. On the way back.
>
> Q. And at about what time would you say it was when you started for New York and were on your own? A. About 8:40, 8:45.
>
> Q. At night? A. At night.
>
> Q. And weather conditions at that time, had they moderated at all? A. Not one bit.
>
> Q. Will you tell us what action there was on the part of your boat and the seas as you were going towards New York; describe first how she was acting. A. *She was diving with every wave, and before we could come up again after being covered over with the wave another sea would hit us and another one and another one. It wouldn't give us a chance to throw off the water that we were being covered up with.*

* * *

Q. And did the scuppers and freeing ports take care of the seas which were coming aboard of her? A. No. They kept—they were coming too fast and too heavy" (R., pp. 24-25). (Italics ours.)

The witness' testimony on re-cross examination demonstrates convincingly that the vessel had not suffered any injuries while the insurance was suspended which brought about her subsequent sinking, or at least upon the entire case so a jury might fairly find. Thus, he testified:

"Q. Now, your whole trouble started in the breakers just before you cut your hawser; isn't that so? A. No, sir.

Q. When did your trouble start? A. Our troubles started when we were off Jones Inlet and the seas were heavier and we couldn't stand it any more.

Q. That was before you cut your hawsers, wasn't it? A. No. While we were running light to New York we had let go of the three scows we got in real danger" (R., pp. 58-59).

From the foregoing brief review of the evidence it is evident that a jury could reasonably find that the increased severity of the storm was too much for the small tug and that her exposure to the overpowering elements after she had cut loose from the barges, and after the insurance had reattached, were the actual cause of her sinking. Giving this evidence due weight it would seem plain that it was sufficient to establish that the loss occurred from perils encountered after the insurance had reattached, thereby overcoming any contrary inference arising from the evidence relating to the occurrences during the attempted rescue. At least, it would seem that on the whole case a fair question of fact was presented requiring submission of the issue to the jury.

The situation at bar does not differ in principle from that presented in cases were a vessel shortly after sailing becomes leaky and suddenly sinks. In those cases it has been held that the circumstances mentioned are merely presumptive evidence of unseaworthiness, and that the presumption is not conclusive but may be rebutted by showing that the loss was occasioned by some cause other than unseaworthiness (*Petrie* v. *P. Ins. Co.*, 132 N. Y. 137, 144; *Singleton* v. *P. Ins. Co.*, 132 N. Y. 298, 303-304; *McLain* v. *Brit. and For. Mar. Ins. Co.*, 16 Misc. 336, 337).

Generally, it is well settled, any material evidence pointing to one of the perils insured against as a probable cause of the loss will suffice to raise a question of fact whether the loss was occasioned by such peril or by unseaworthiness, even though there be strong indications that the loss might have been caused by the latter condition (*Massey S. S. Co.* v. *Importers' and Exporters' Ins. Co.*, 153 Minn. 88; *Green* v. *Globe and Rutgers Fire Ins. Co.*, 200 App. Div. 343; *Hellman Transp. Co.* v. *Home Ins. Co.*, 268 Pa. 547; *Swift* v. *Union Mutual M. Ins. Co.*, 122 Mass. 573; *Fireman's Fund Ins. Co.* v. *Globe Nav. Co.*, 236 Fed. 618, 623 [C. C. A. 9]; *American Mcht. Marine Ins. Co.* v. *Liberty S. & G. Co.*, 282 Fed. 514, 518 [C. C. A. 3]; cert. denied 260 U. S. 737).

In *Massey S. S. Co.* v. *Importers' and Exporters' Ins. Co., supra,* the Court referred with approval, in the following language appropriate to the situation at bar, to the holding in the case of *Anderson* v. *Morice*, L. R. 10 C. P. 58:

> "It was the opinion of the court that there would be an irresistible inference of unseaworthiness if a ship sank in smooth water without any apparent cause and there was no other evidence as to her con-

> dition; *but when there was other evidence of the nature already mentioned* [*i. e.*, proof of loss from a peril covered by the policy], *the fact of the ship's sinking became one of several facts, which must all be left to the jury, and, if they concluded on the whole evidence that the ship was seaworthy, they might find that she was lost by a peril of the sea, though unable to ascertain or safely conjecture what such peril was.*" (Italics ours.)

Granting, *arguendo*, that petitioner had the burden of proving that the sinking was not caused by injuries the vessel received while the insurance was suspended, it is submitted that any reasonable explanation of the loss which indicated that the sinking was caused by a peril insured against, would fully meet that burden, and create an issue of fact for the jury (cf. *Long Dock Mills and Elevator Co.* v. *Mannheim Ins. Co.*, 116 Fed. 886, 888; aff'd 123 Fed. 861). In the instant case there was ample evidence that the sinking was actually caused by the increased severity of the storm after the "Duke" had cast off from the barges and after the insurance had reattached.

There is no occasion, we submit, for giving conclusive and irrebuttable effect to any inference that the "Duke's" loss was caused by her efforts during the attempted rescue. Any inference arising from those circumstances is not entitled to more weight than the presumption of unseaworthiness arising from a sudden sinking, which, as we have seen, is subject to rebuttal by proof that the sinking might have been occasioned by some other cause.

The mere fact that the Court might have felt that the proof preponderated in favor of respondents' theory did not justify taking the case from the jury (*M'Intyre* v. *Modern Woodmen of America*, 200 Fed. 1, 8 [C. C. A. 1]).

The weight of the evidence is for the jury (*Crumpton* v. *United States,* 138 U. S. 361, 363), and a court should not substitute its viewpoint for theirs (*Sioux etc. R. R. Co.* v. *Stout,* 84 U. S. 657, 663). Where, as here, there is some material evidence on a question of fact, the jury should be permitted to pass on it, whether the evidence be strong or weak (*Hickman* v. *Jones,* 76 U. S. 197, 201).

In the case at bar there was little evidence elicited concerning the boat's condition when she cut away from the barges. The members of her crew, with the exception of the master, did not testify. On the trial this phase of the case appears to have been subordinated by all concerned to the question whether in assisting in the tow of more than one vessel the "Duke" had breached the towage warranty; that, indeed, being the principal basis for respondents' motions for a directed verdict (R., pp. 69, 71), and the ground upon which the Trial Court decided the case (R., pp. 73-74). Considered in the light of all the circumstances it would seem clear that petitioner was entitled to have the issue as to the cause of the sinking submitted to the jury.

It is submitted, with all due deference, that in holding otherwise the Court below substituted its judgment for that of the jury on an issue properly determinable by the latter. By its approach to the problem and the result reached the Court below has deprived petitioner of his right to a jury trial upon a vital and decisive issue in the case. The interests of substantial justice require, we submit, that the determination below be reviewed by this Court.

CONCLUSION.

For the reasons stated in the petition and in this brief, it is respectfully submitted that the application for a writ of certiorari should be granted.

Respectfully submitted,

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